No. 93-1318

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION,

Petitioner,

v.

TRANSCON LINES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the filed rate doctrine and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the ICC has the authority to prevent a carrier from collecting its concededly duly filed and lawful tariff rate solely on the ground that the carrier failed to comply with the ICC's non-tariff credit regulations.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Statutes and Regulations Involved	2
Statement of the Case	3
Summary of Reasons for Denying the Writ	8
Reasons Why Writ Should Be Denied	10
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

Page

CASES

Gumport v. ICC, 113 S.Ct. 2907 (1993) 6

ICC v. Transcon Lines, 113 S.Ct. 2955 (1993) 7

ICC v. Transcon Lines, 9 F.3d 64 (9th Cir. 1993) 7

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922) 10

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ..... *passim*

Reiter v. Cooper, 507 U.S. ___, 113 S.Ct. 1213 (1993) *passim*

Security Services, Inc. v. K Mart Corp., No. 93-284 (argued February 28, 1994) 9, 15

Southern Pacific Transp. Co. v. Commercial Metals, 456 U.S. 336 (1982) ..... *passim*

White v. ICC, 989 F.2d 643 (3d Cir. 1993) 13

ADMINISTRATIVE DECISIONS

Nonoperating Motor Carriers – Collection of Undercharges, 8 I.C.C. 2d 742 (1992) 13

STATUTES

49 U.S.C. § 10701(a) 11, 18, 20

49 U.S.C. § 10743 19

49 U.S.C. § 10743(b) 20

49 U.S.C. § 10743(b)(1) 18, 19

49 U.S.C. § 10761 11

TABLE OF AUTHORITIES – Continued

Page

49 U.S.C. § 10762 ..... 11, 19, 20

49 U.S.C. § 10762(a)(1) 5

49 U.S.C. § 11702 ..... 18, 19

49 U.S.C. § 11702(a)(4) 6, 19, 20

49 U.S.C. § 11702(a)(6) 6

49 U.S.C. § 11705(b)(3) 8, 18

49 U.S.C. § 11906 ..... 2, 14

49 U.S.C. § 11914 ..... 2, 14

REGULATIONS

49 C.F.R. § 1322 4

49 C.F.R. § 1320 2

49 C.F.R. § 1320.2(g)(1)(ii) 4

49 C.F.R. § 1320.2(g)(2)(iii) 5

49 C.F.R. § 1320.2(g)(2)(vi) 4

49 C.F.R. § 1320.3(c) 4

MISCELLANEOUS

Hearing On The Negotiated Rates Issue And Proposed Legislative Solutions Thereto, 103rd Cong., 1st Sess., H.R. Doc. No. 103-18 (June 15, 1993) 15

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Respondents, Transcon Lines ("Transcon") and Leonard L. Gumport, Chapter 7 Trustee ("Trustee") for the Estate of Transcon Lines, hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit by Petitioner, Interstate Commerce Commission ("ICC") be denied.

STATUTES AND REGULATIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act ("Act"), 49 U.S.C. § 10101, *et seq.* and the ICC's credit regulations, 49 C.F.R. § 1320, set forth by Petitioner in its Appendix (Pet. App. 74a-87a), Respondents believe the following additional statutory provisions are involved:

49 U.S.C. § 11906 Evasion of regulation of motor carriers and brokers.

A person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under this subtitle for motor carriers or brokers shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 for a subsequent violation.

49 U.S.C. § 11914(b) General criminal penalty when specific penalty not provided.

(b) When another criminal penalty is not provided under this chapter, a person that knowingly and willfully violates a provision of this subtitle or a regulation or order presented under this subtitle, or a condition of a certificate or permit issued under this subtitle related to transportation that is subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, shall be fined at least $100 but not more than $500 for the first violation and at least $200 but not more than $500 for a subsequent violation. A separate violation occurs each day the violation continues.

STATEMENT OF THE CASE

This case, which comes before this Court for a second time on the same grounds, involves a suit by the ICC to enjoin Respondents, Transcon and its bankruptcy trustee, Leonard L. Gumport, from collecting Transcon's concededly duly filed and lawful tariff charges. The ICC contends that the Trustee cannot collect Transcon's filed rates solely because Transcon, while an active carrier, had violated certain billing requirements set forth in the ICC's credit regulations. The ICC admits that Transcon's tariff provision at issue was part of Transcon's duly filed rates and fully complied with all ICC regulations – including its credit regulations. The ICC also concedes that pursuant to this Court's decision in *Southern Pacific Transp. Co. v. Commercial Metals,* 456 U.S. 336 (1982), shippers cannot raise Transcon's violation of the ICC's credit regulations as a defense to prevent the Trustee from collecting Transcon's filed rates. Nonetheless, the ICC maintains that by utilizing its "enforcement" powers the ICC may relieve shippers from their statutory obligation to pay Transcon's filed rate by enjoining the Trustee's collection efforts.

The tariff provision at issue provided that discounts from Transcon's base rates were conditioned upon a shipper's paying the discounted rate within ninety days of shipment. Failure by a shipper to pay the discounted rate within that time period resulted in the requirement that the shippers pay the undiscounted tariff rate.[1]

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[1] Transcon's loss-of-discount tariff rule provided in relevant part:

In the proceedings below, the ICC admitted that Transcon's loss-of-discount provision was authorized by, and fully complied with the ICC's regulations. *See* 49 C.F.R. § 1320.2(g)(1)(ii), Pet. App. 57a-58a, 83a-84a, Opp. App. 1a-2a.[2] *Infra*, pp. 15-16.

The Trustee admitted that Transcon did not comply with certain other provisions of the regulations which did not involve Transcon's tariffs. First, the ICC claimed, and the Trustee did not dispute, that Transcon failed to specifically state its loss-of-discount penalty in its original freight bills as required by 49 C.F.R. § 1320.3(c). Second, Transcon did not issue revised freight bills that included the undiscounted charges as "liquidated damages" within ninety days after the expiration of the authorized credit period as required by 49 C.F.R. § 1320.2(g)(2)(vi). Third, Transcon had not sent out individual bills to shippers seeking to apply the loss-of-discount penalty, and

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1. Allowances, discounts, exception classes and commodity rates shall apply only when tariff charges are paid within ninety calendar days from date of shipment.
2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condition precedent for the application of the special tariff provisions described in paragraph 1 above.

(Vol. I, Resp. C.A.E.R. 41 (ICC TCON 103-A, Item 210)).

[2] Citations to the appendix submitted with the Petition are referred to as "Pet. App. ___;" citations to the appendix submitted with this Brief in Opposition are referred to as "Opp. App. ___."

the Trustee, out of necessity, applied the loss-of-discount provision by aggregating freight bills in violation of 49 C.F.R. § 1320.2(g)(2)(iii).

The Trustee argued that the ICC's credit regulations could not be used to prevent his collection of Transcon's filed rate based upon this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). As a second ground for denying the injunction, the Trustee claimed that Transcon's entire discount scheme was illegal because the discounts were masked by secret numerical codes. Without a filed "key" to the shipper codes the discounts were not "published" as required by the Act, specifically 49 U.S.C. § 10762(a)(1). The Trustee, therefore, claimed that the ICC could not compel him to adhere to these discounts.

The district court agreed with the Trustee on both grounds. The trial court held that (1) the ICC's credit regulations could not be enforced so as to prevent operation of the statutory filed-rate doctrine, Pet. App. 56a-58a, and (2) the discounts to the extent they failed to reveal the identity of the customers to whom they applied violated the publication requirement of the Act and, therefore, could not be enforced. Pet. App. 58a-60a. Thereupon, the district court denied the ICC's motion for summary judgment, and granted the Trustee's cross motion for summary judgment, dismissing the case. Pet. App. 67a, 69a-72a.

The ICC timely filed an appeal to the Ninth Circuit. On appeal, the Ninth Circuit affirmed the district court's judgment with regard to the dismissal of the ICC's injunction for Transcon's credit rules violation, but

reversed for lack of standing the Trustee's challenge to the secretly coded tariffs. Pet. App. 10a-40a. This Court denied the Trustee's petition for writ of certiorari seeking to review the court of appeals' standing holding. *See Gumport v. ICC*, 113 S.Ct. 2907 (1993).

The court of appeals recognized that the ICC is authorized by statute to bring a civil action to enforce its regulations against motor carriers, including the trustees of bankrupt motor carriers. Pet. App. 26a. This enforcement power includes the "general" power to seek an injunction pursuant to 49 U.S.C. § 11702(a)(4) and (a)(6). Pet. App. 31a. However, the court of appeals said the ICC could not use its "general" injunctive power to enforce regulations in such a way as to undercut the "utterly central" filed rate requirement. Pet. App. 26a. "Regulations, however valid in other contexts, cannot furnish the reason for letting a carrier abandon the filed rate." Pet. App. 32a. The court of appeals found that the ICC improperly sought to enforce its credit regulations in such a way that encourages and endorses "circumventing the filed rate requirement, for it would prevent the Trustee from collecting the bureau rates in accordance with all of its filed tariffs." *Id.* The court of appeals concluded that if the ICC's injunctive action against the Trustee's filed rate was allowed to stand, " 'the ICC [would permit] the very price discrimination the Act by its terms seeks to prevent'." *Id.* quoting *Maislin*, 497 U.S. at 130.

The ICC's broad interpretation of its credit regulations was rejected by the court of appeals as of no greater force and effect than the *Negotiated Rates* policy rejected by this Court in *Maislin*. The court of appeals, therefore,

affirmed the district court's judgment in favor of the Trustee as to the collection of Transcon's filed rates on overdue accounts. *Id.* at 40a.

The ICC filed a petition for writ of certiorari that argued that the court of appeals' decision conflicted with this Court's recent decision in *Reiter v. Cooper*, 113 S.Ct. 1213 (1993). The ICC claimed the court of appeals did not have the benefit of the *Reiter* decision. On this basis, the ICC requested this Court to vacate the court of appeals decisions for further consideration in light of *Reiter*. Alternatively, the ICC suggested that summary reversal was warranted in view of this Court's decision in *Commercial Metals, supra*, 456 U.S. 336 (1982). On June 14, 1993, this Court granted certiorari and remanded for further consideration in light of *Reiter*. *See ICC v. Transcon Lines*, 113 S.Ct. 2955 (1993).[3]

The court of appeals, on remand, concluded that *Reiter* did not require a reversal of its prior judgment. *See ICC v. Transcon Lines*, 9 F.3d 64 (9th Cir. 1993). The court of appeals noted that *Reiter* addressed a problem of "timing" that had arisen out of the interplay between the filed rate doctrine and claims and defenses to the filed rate doctrine "specifically accorded by the Interstate Commerce Act". Pet. App. 2a-3a. The shippers in *Reiter* raised as a defense the specific statutory right accorded to them by the Act to claim damages, called reparations, for the

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[3] This Court did not summarily reverse the lower court opinion based upon *Commercial Metals*, nor did this Court even suggest that the court of appeals consider its judgment in light of *Commercial Metals*. Nevertheless, the ICC again seeks that relief.

imposition of allegedly unreasonable filed rates. *See* 49 U.S.C. § 11705(b)(3). As held by this Court in *Maislin*, if the filed rate was found by the ICC to be unreasonable it was "not enforceable." *Maislin*, 497 U.S. at 129. *Reiter* allowed a shipper to plead rate unreasonableness as a counterclaim and (under certain circumstances) avoid paying the filed rate while the ICC determined what, if any, reparations were owed by the carrier. 113 S.Ct. at 1221. In *Commercial Metals*, however, this Court had already determined that the Act does not specifically accord a claim or defense to a shipper on the basis of a carrier's violation of the ICC's credit rules. Therefore, the court of appeals held that *Reiter* did not apply to the facts of this case. Pet. App. 4a.

The court of appeals also held on remand that, even if the ICC's general enforcement powers could be considered a "claim accorded to the ICC" (as opposed to shippers) by the Act, *Maislin* required that any perceived conflict between two statutory provisions be resolved in favor of enforcing the "utterly central" provisions of the filed rate doctrine. Pet. App. 8a-9a. The court of appeals thus held, as it had previously, that the ICC could not use its injunctive powers to prevent the collection of a lawful and duly filed common carrier rate.

SUMMARY OF REASONS FOR DENYING THE WRIT

The writ should be denied for the following reasons:

1. *Commercial Metals* does not support the ICC's request for summary reversal as this Court has never held that the ICC may use its enforcement powers to prevent the collection of a carrier's concededly duly filed and lawful rate. The court of appeals' decision explains this. *See* Pet. App. 4a-5a, and 7a.

2. *Reiter* also does not support the ICC's request for summary reversal as this Court has never held that the ICC's general statutory enforcement powers and right to regulate carrier credit are "claims and defenses" to the filed rate doctrine "specifically accorded" by the Interstate Commerce Act. The court of appeals' decision explains this. *See* Pet. App. 3a, 5a, and 8a.

3. The court of appeals' decision does not prevent the ICC from fully enforcing its credit regulations to ensure carrier compliance. The decision only prevents the ICC from relieving shippers of their statutory duty to pay the carrier's concededly duly filed and lawful rate. Any carrier and/or its employees who violate the ICC's credit regulations remain subject to all civil and criminal penalties provided by the Act. The court of appeals' decision explains this. *See* Pet. App. 6a-7a.

4. There is no circuit split with respect to the court of appeals' decision. The initial court of appeals' decision explains this. *See* Pet. App. 33a. The ICC does not claim in its petition that there is need for this Court to resolve any conflicting circuit decisions.

5. The ICC also admits that the "filed rate doctrine" issue under consideration by this Court in *Security Services, Inc. v. K Mart Corp.*, No. 93-284 (argued Feb. 28, 1994) "involves different principles," and review by this Court is therefore not necessary to resolve any potentially

conflicting jurisprudence. *See* Pet. at 16-17 n.11.[4] Specifically, the tariff involved in Transcon's case was and is concededly duly filed and lawful. The ICC admitted this both in the district court and in the court of appeals. *See* Pet. App. 57a-58a, Opp. App. 1a-2a.

REASONS WHY WRIT SHOULD BE DENIED

The ICC, citing *Commercial Metals*, concedes in its petition that "[a] shipper cannot raise the carrier's violation of the credit regulations in defense to an action to collect the filed rate." Pet. at 6. Despite this concession, the ICC believes that it may afford a shipper complete relief from its legal obligation to pay the carrier's filed rate if the carrier fails to otherwise comply with the ICC's non-tariff credit regulations. The ICC claims it must have the ability to prevent collection of the filed rate when credit regulation violations have occurred so as to "limit the impairment of shipper confidence in the regulated trucking industry that such violations have caused." Pet. at 18. Yet, as repeatedly recognized by this Court, "the filed rate governs the legal relationship between shipper and carrier." *Maislin*, 497 U.S. at 126. Moreover, "[u]nless and until suspended or set aside, [the published tariff] is made for *all purposes*, the legal rate, as between carrier and shipper." *Id.*, quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922) (emphasis supplied).

[4] Citations to the petition for writ of certiorari are referred to as "Pet. at ___."

In *Maislin*, this Court rejected the same argument made by the ICC here. That is, the ICC had attempted to justify its *Negotiated Rates* policy "as a remedy for the carrier's failure to comply with § 10762's directive to file the negotiated rate with ICC." *Maislin*, 497 U.S. at 131. In *Maislin* the Commission argued "that the carrier should not receive a windfall, i.e., the higher filed rate, from its failure to comply with the statute." *Id.* Rejecting this analysis, this Court found that "§ 10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such 'equities' are relevant to the application of § 10761." *Id.* (emphasis original).

The court of appeals thus correctly told the ICC what it was told previously by this Court in *Maislin*: The ICC has no right to enforce regulations in such a manner as to prevent carriers from enforcing their duly filed tariffs. Pet. App. 7a. In *Maislin*, the ICC asserted that its express statutory power to prohibit "unreasonable practices" pursuant to 49 U.S.C. § 10701(a) permitted it to prohibit a carrier from enforcing its filed tariff. As here, the ICC claimed in *Maislin* that it had the power to waive the collection of the filed rate in those cases where denial of collection of the filed rate was necessary to deter improper carrier conduct. This Court recognized that the carrier's practice of negotiating and billing unfiled rates was illegal and that the ICC had the power to subject the carrier to civil and criminal penalties, *Maislin*, 497 U.S. at 120. But this Court still held that the ICC could not prevent the carrier, or its bankruptcy trustee, from collecting the filed tariff rate. This Court explained: (1) the filed-rate doctrine is "utterly central" to the Interstate Commerce Act, so that (2) the ICC has no power to adopt

rules "sanctioning adherence to unfiled rates. . . . " *Maislin*, 497 U.S. at 132.

Notwithstanding the clear directive of *Maislin*, the ICC asserts that this Court's decision in *Reiter v. Cooper*, *supra*, is controlling with regard to the ICC's ability to prevent a carrier from collecting its filed rate. "[T]he filed rate doctrine 'does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself.' " Pet. at 9, quoting *Reiter*, 113 S.Ct. at 1219 (emphasis in original). However, the specific "claims and defenses" to the filed rate doctrine referred to by this Court in *Reiter* were those raised by "shippers," and as the ICC correctly notes *Southern Pacific Transportation Co. v. Commercial Metals*, *supra*, provides that a shipper cannot raise the carrier's violation of the ICC's credit regulations in defense of an action to collect the filed rate. Pet. at 6. The court of appeals reviewed *Reiter's* plain holding and properly found that it did not alter the result in its prior opinion because the Act "does not specifically accord a claim or defense to the shipper on the basis of credit regulation violations." Pet. App. 4a. *Reiter* and *Commercial Metals* thus provide no assistance to the ICC's attempt to forge an end run around *Maislin*.

The court of appeals' judgment in this case no more vitiates the ICC's statutory power and right to regulate motor carrier credit than *Maislin* vitiated the ICC's statutory power and right to regulate motor carrier practices. The ICC continues to be free to regulate the credit practices of all carriers throughout the United States, including those within the Ninth Circuit. The ICC may, and should, issue cease and desist orders and seek injunctions

against carriers and their employees who violate its credit regulations as well as its other regulations promulgated pursuant to the Act. As noted by this Court in *Commercial Metals*:

> The ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, the power to seek a federal-court injunction requiring the carrier to comply with the regulations, and the power to bring suit for the $5,000.00 civil forfeiture, provided by the [the Act], for each knowing violation of an order of the Commission.

456 U.S. at 349-50 (citations omitted).[5]

The ICC correctly notes that it is too late to enjoin Transcon from violating the billing portion of its credit regulations since the carrier is no longer operating. The ICC attempts to "bootstrap" its failure to enforce its credit regulations against Transcon at the time it was operating into a right to enforce them retroactively by preventing the Trustee from collecting filed rate charges. The ICC misconstrues its injunctive powers. It is axiomatic that one cannot use injunctive powers to prevent conduct that has already occurred. As noted by the court

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[5] The Third Circuit in *White v. ICC*, 989 F.2d 643 (3d Cir. 1993) rejected the ICC's attempt to utilize *Commercial Metals* to justify interfering with the collection of filed tariff charges by the bankruptcy trustee. In *White*, the Third Circuit set aside ICC regulations promulgated in *Nonoperating Motor Carriers – Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). These illegal regulations operated to enjoin trustees from proceeding with undercharge actions unless approved by the ICC.

of appeals, the Commission, however, is not powerless to enforce its credit regulations. The Commission "has at its disposal a wide array of tools for enforcing its credit regulations". Pet. App. 6a. These "tools" include fines for knowing and willful violations of its orders and regulations. *See* 49 U.S.C. §§ 11906 and 11914.[6] The ICC dismisses these additional remedies by claiming incorrectly that they are limited to "operating carriers," or "presuppose a continuing violation." Pet. at 15. The ICC claims instead that the "most logical and effective remedy for the ICC [to enforce its credit regulations] is to deny the Trustee the power to exact additional charges from shippers, . . . " *Id.* While the ICC may have "discretion to draft appropriate remedies for violations of the statute," the "remedy" may not conflict with the "core purposes of the Act." *Maislin*, 497 U.S. at 133. The ICC can point to no provision within the Act that allows it to utilize its

[6] 49 U.S.C. § 11906 states that "a person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under [the Act] of motor carriers . . . shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 per subsequent violation." 49 U.S.C. § 11914 provides for similar criminal penalties for a person who violates the Act or a regulation or order of the ICC. The ICC thus could ascertain who at Transcon was responsible for failing to comply with the credit regulations and seek to enforce civil and criminal forfeitures against those individuals. The ICC could also find out if these individuals are still engaged in the trucking industry and if so enjoin them from future credit rule violations. This type of enforcement would send a strong message to ongoing carriers to comply with the regulations, while not disturbing the "utterly central" requirement that carriers collect and shippers pay filed tariff rates.

injunctive powers to prevent the collection of a concededly duly filed and lawful common carrier rate. Lacking statutory support, the ICC's belief that its enforcement powers need enhancement to prevent carrier filed rate collection efforts is a matter for Congress, and not the courts to address.[7]

The ICC also characterizes this case as involving a dispute as to which of two filed rates would apply. Pet. at 15-16. The ICC is wrong. The court of appeals correctly recognized that it was confronted with an unambiguous, legally filed tariff: "there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount." Pet. App. 33a.

At argument before the Ninth Circuit the ICC's counsel, Mr. Rush, conceded that Transcon's loss-of-discount tariff provision was lawful and fully complied with the credit regulations.[8]

[7] The ICC at a hearing which led to the passage of the Negotiated Rates Act of 1993, P.L. 103-180 ("NRA"), requested that Congress amend the Act to provide it with the power to enjoin carriers from collecting their filed rates when they violate the ICC's credit regulations. *See Hearing On The Negotiated Rates Issue And Proposed Legislative Solutions Thereto*, 103rd Cong., 1st Sess., H.R. Doc. No. 103-18 at p. 36 (June 15, 1993). As noted by the ICC, the NRA contains no such amendment and this case is unaffected by the new legislation. Pet. at 18 n.12.

[8] The ICC thus admits there is no similarity between this case and *Security Services, Inc. v. K Mart Corp.*, No. 93-284 (argued February 28, 1994), in which the carrier's tariff admittedly did not comply with the ICC's regulations. *See Pet. at 16 n. 11.*

THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading[?]

MR. RUSH: No. *We don't contend the tariff violated anything*. We contend that the tariff was one of the four things that had to be done in order to be released from the obligations to charge no more than the discounted rate.

Opp. App. 1a-2a, (emphasis supplied).

Before the district court the ICC's counsel, Mr. Day, also conceded that Transcon's "filed rate" included *all* of Transcon's filed tariffs:

THE COURT: For the purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the Defendant Trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs including class rates, bureau rates, rules tariffs, and discount rates.

Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."

MR. DAY: Your honor –

THE COURT: Just that question.

MR. DAY: Just that question. No, *I don't take issue with that at all.*

Pet. App. at 57a-58a (emphasis added).

The ICC in its petition ignores these critical admissions of its counsel. Despite conceding that the loss-of-discount provision was lawful and part of Transcon's filed rate, the ICC now claims that its injunction would not require "departure from the tariff schedule entirely." Pet. at 15. This is nonsense. There is only one tariff rate applicable for shippers who paid after ninety days, and that rate is the undiscounted bureau rate. Thus, it is irrelevant that the ICC calls the loss-of-discount tariff provision a "credit term" or "liquidated damages". Pet. at 16. It is also irrelevant that the ICC claims that Transcon was able to publish a loss-of-discount provision solely because it had authorized the filing of such a tariff term in its credit regulations. Although the ICC remains free to authorize or prohibit the use of loss-of-discount tariffs, it cannot have it both ways: the ICC cannot authorize carriers to file loss-of-discount tariffs and simultaneously preclude carriers from enforcing those tariffs as required by *Maislin*.[9]

The ICC opines that because *Maislin* contains the caveat that the filed rate "is not enforceable if the ICC finds the rate to be unreasonable" (citing 497 U.S. at 128), a filed rate is "not enforceable" if the ICC finds that the

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[9] The court of appeals in its initial decision properly distinguished two unpublished circuit court decisions cited by the ICC that had affirmed the ICC's denial of undercharge claims based on admittedly illegal loss-of-discount tariff provisions. *See* Pet. App. 33a. Here it is conceded that Transcon's loss-of-discount tariff provision fully complied with the ICC's credit regulations and the ICC does not suggest that there is any circuit authority that would allow the ICC to prevent the collection of a concededly duly filed and lawful rate.

carrier violated its credit regulations. Pet. at 12-13 n.7. Of course, as this Court pointed out in *Reiter*, the exception for rate unreasonableness is limited to the "specifically accorded" statutory right of a shipper to seek reparations pursuant to 49 U.S.C. § 11705(b)(3):

> We can agree with respondents that this latter category does not include any "unreasonable-rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

113 S.Ct. at 1219 (italics in original) (citation omitted).

By misapplying *Reiter* to this case, the ICC argues that it can enjoin the Trustee's collection of Transcon's filed rate because the Act gives it the *general* authority to adopt credit regulations, *see* 49 U.S.C. § 10743(b)(1) (prohibiting credit transactions except as authorized by ICC regulations), and the *general* authority to bring a civil action to enforce its regulations, *see* 49 U.S.C. § 11702. The ICC made the same argument in *Maislin*, but utilized instead its statutory power to regulate "unreasonable practices," provided by 49 U.S.C. § 10701(a) requiring carrier practices to be reasonable. As in *Maislin*, the ICC's argument here is without merit.

First, contrary to the position taken by the ICC, *Reiter* reaffirms the principle that the Act's *general* requirements do *not* give rise to a defense precluding enforcement of the "utterly central" filed rate doctrine. *Reiter*, 113 S.Ct. at 1219 ("defenses which may be used in an attempt to avoid payment of the filed rate are those "specifically

accorded by the [Act] itself" and do not include defenses "derived from . . . general [Act] requirement[s]"). Thus, while § 10743(b)(1) *generally* authorizes the ICC to adopt credit regulations, it does not "specifically accord[]" the ICC the power to promulgate a regulation enjoining collection of the filed rate as a remedy for a carrier's violation of those regulations. In fact, § 10743 cannot be reasonably read to condone any deviations from the filed rate. As noted by the ICC the term "payment" as used in § 10743 means paying the "full filed rate." Pet. at 4. Section 10743(b)(1) allows the carrier to give up possession of the freight before "[full] payment" is made, pursuant to ICC regulations. *Id.* Section 10743(b)(1) does not however provide that the ICC may prevent, by regulation, a carrier from ultimately collecting "full" payment, i.e., its filed rate.

Section 11702(a)(4) is also a *general* statutory authorization which provides the ICC with general power to "enforce" its regulations.[10] In sum, §§ 10743(b)(1) and

[10] The use in Section 11702(a)(4) of the term "enforce" cannot be read as tacitly vesting in the ICC an implied power to "disentitle" a carrier from collecting its filed rate. Indeed, no provision of the Act accords the ICC that power. The following hypothetical illustrates this point further. If a carrier violated a tariff regulation (adopted pursuant to 49 U.S.C. § 10762) by negotiating and billing a rate other than its duly filed and published rate, in violation of § 10762, the ICC could bring an enforcement action under § 11702 to obtain a cease and desist order preventing the carrier from charging the unfiled rate. The ICC could not, however, bring an action to "disentitle" the carrier from collecting the filed rate as a remedy for that violation without running afoul of the filed rate doctrine and the teachings of this Court in *Maislin*.

11702(a) are the analogs of § 10701(a), which contains the Act's general requirement that rates be "reasonable." Just as in *Reiter* this Court held that § 10701(a) does not give rise to a defense to the payment of a carrier's filed rate, the general pronouncements of §§ 10743(b) and 11702(a) do not confer upon the ICC the right to prevent the Trustee's collection of the filed rate as a remedy for Transcon's violation of the post-shipment billing requirements contained in the ICC's regulation.

Second, the ICC may not use its power under one part of the Act to undermine the Act's "utterly central" filed rate provisions. *Maislin*, 497 U.S. at 132. "By sanctioning an adherence to unfiled rates, the ICC rule 'undermines the basic structure of the Act.' " *Maislin*, 497 U.S. at 132. It made no difference that the *Negotiated Rates* policy was a purported statutory *remedy* "to comply with § 10762's directive to file the negotiated rate with the ICC." *Maislin*, 497 U.S. at 131. The ICC's argument here – that its attempt to prevent collection of the filed rate is justified by its statutory power to adopt credit regulations and enforce the Act – is the same argument rejected in *Maislin*. Moreover, the argument conflicts with the long-standing rule, reiterated in *Reiter*, that "tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier." *Id.*, 113 S.Ct. at 1221 (citations omitted). As noted previously, the ICC's counsel conceded that Transcon's rates were never disapproved by the ICC and that the loss-of-discount provision is part of Transcon's filed rate. *See* pp. 15-16, *supra*.

Third, the ICC presumptuously claims the proper course to follow is for this Court to summarily reverse

the court of appeals judgment in light of *Reiter* and *Commercial Metals*. Pet. at 10 and 19. However, these cases, even if read capaciously, provide no support for the ICC's view that it may enjoin the operation of a duly filed, legal tariff.

Reiter addresses only a shipper's right to assert by way of a recoupment counterclaim the reparations right "specifically accorded" to it by the Act. *See* pp. 7-8 *supra*. All shippers who receive undercharge claims based on Transcon's loss-of-discount provision will still have that same right and there is nothing in the court of appeals' decision which implies the contrary.

Commercial Metals denies a shipper the right to utilize a violation of the ICC's credit regulations as a defense to the carrier's collection of a filed rate. There is nothing within *Commercial Metals* which would allow the ICC to act as the shipper's surrogate and provide it with that defense by way of an injunctive action. *See* pp. 12-15 *supra*. While *Commercial Metals* does state that the ICC, as opposed to the shipper, has the statutory power to enforce credit regulations, 456 U.S. at 349, *Commercial Metals* does *not* address the issue of whether the ICC has the statutory power to utilize its credit regulations to prevent the collection of a carrier's applicable filed-rate. This Court resolved that issue eight years later in *Maislin*. The ICC has no statutory authority to "exempt" motor common carriers from the requirement that they collect their published tariff rates. *Maislin*, 497 U.S. at 135-36.

Finally, the court of appeals correctly rejected the ICC's attempt to use its general authority to regulate

carriers' credit and enforce the Act as a device to circumvent the filed rate doctrine. The court of appeals recognized that the ICC had a "wide array of tools" to enforce its credit regulations and that the "*only* thing the ICC cannot do upon a violation of credit regulations is enjoin a carrier from suing a shipper for the filed rate." Pet. App. 7a (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should deny the ICC's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Copy of Excerpt of Unofficial Transcript of Oral Argument of *ICC v. Transcon* on April 8, 1992 Concerning: The Lawfulness of Transcon's Loss-of-Discount Tariff

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BY THE COURT:

Well as I understand it, I want to clarify something – as I understand it in 1988 the Commission adopted a regulation that expressly authorized loss of discount provisions.

MR. RUSH [COUNSEL FOR ICC]:

As a measure of liquidated damages for the need to collect, yes Sir.

BY THE COURT:

And at that point the regulations did not include did they these detailed notice and rebilling requirements.

MR. RUSH:

From 1985 the regulations required that if you were going to impose any penalty that the exact amount and nature and how it came into being must be shown on your bill of lading so that much existed in 1988 because it was there from 1985. The other two provisions were adopted in 1989. The rebilling and the no aggregate batch assertion requirements.

BY THE COURT:

Alright. So the filed rate could not have violated those particular regulations – the latter regulations you were describing at the time of the filing.

MR. RUSH:

No because it was filed in 1987.

BY THE COURT:

Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

MR. RUSH:

No. We don't contend the tariff violated anything. We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate.

* * *